U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 26Apr2002

Case No.: 2001-LHC-0902

OWCP No.: 01-140491

In the Matter of

THOMAS COLELLA,
Claimant

v.

ELECTRIC BOAT CORPORATION,
Employer,

NATIONAL EMPLOYERS COMPANY,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

Scott Roberts, Esq.
For the claimant

Edward Murphy, Esq.
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, [33 U.S.C. § 901 *et seq.*], hereinafter referred to as the Act. The case was referred to the Office of Administrative Law Judges on December 21, 2000. (ALJX 1).

Following proper notice to all parties, (ALJX 2), a formal hearing was held on July 18, 2001, in New London, Connecticut. Exhibits of the parties were admitted in evidence at the hearing pursuant to 20 C.F.R. § 702.338, and the parties were afforded the opportunity to present testimonial evidence.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX, EX, and CX pertain to the exhibits of the administrative law judge, employer, and claimant, respectively. References to JX pertain to joint exhibits. The transcript of the hearing is cited as Tr. and by page number.

STIPULATIONS

The employer and Claimant stipulated to the following:

1. The instant claim and parties are subject to the provisions of the Act;

2. An employer/employee relationship existed between the parties at all times relevant to these claims;

3. On April 25, 1997, Claimant suffered injuries to his back arising out of and in the scope of his employment with Electric Boat Corporation;

4. The employer was timely notified of the claimant's injuries;

5. The Notice of Controversion was timely filed;

6. The Informal Conference took place on December 6, 2000;

7. Disability occurred from the injury;

8. Medical benefits were paid under Section 7 of the Act in the amount of $7903.31;

9. Claimant was paid temporary total disability benefits from April 26, 1999, to November 3, 2000, in the amount of $511.55 per week for 158.76 weeks, totaling $81,214.32;

10. Claimant was paid temporary partial disability benefits from November 4, 2000, to the present in the amount of $303.55 per week;

11. Claimant is 10% permanently disabled in his back; and

12. The claimant's average weekly wage in $767.33.

ISSUE

The following issue remains for resolution: whether the nature and extent of Claimant's disability entitles him to reinstatement of temporary total disability benefits from November 4, 2000, to the present?

FINDINGS OF FACT

Background

Claimant, Thomas Colella, was born on September 23, 1958. He is married and currently lives in Uncasville, Connecticut. He has two children.

Before his injury, Claimant worked as a painter for General Dynamic Electric Boat Division [hereinafter Electric Boat] in Groton, Connecticut. Claimant started working for Electric Boat in April 1990 as a painter third class. His responsibilities included a variety of tasks around the submarines, such as working needle guns and grinders, chipping guns, and cleaning and sanding rust off metal to prepare it for painting. Claimant also blasted surfaces for paint. He occasionally carried buckets weighing fifty pounds up three and four flights of stairs at a time. (EX 21, p. 25-26).

The claimant was injured on April 27, 1997, while he was painting in a missile room of a submarine. He injured himself as he bent over to pick up his gloves and paint off the floor. (CX 1B). As he bent, Claimant felt a sharp pain in his back. (Id.). Claimant has had several accidents
involving his back. The first incident occurred in 1990 when Claimant twisted his back. In 1994,

the claimant hurt his back picking up duct work. In 1996, he fell down a flight of stairs on a catwalk at work. To treat his pain, the claimant has had physical therapy and epidural injections

Mr. Colella has not been employed since the accident, and claimant performs minor household chores, such as mowing the lawn, on a limited basis. Claimant failed the GED in April 2000, and, as of the date of the formal hearing, the claimant had not retaken the exam.

From April 26, 1997, to November 3, 2000, Electric Boat provided the claimant with temporary total disability benefits. Thereafter, the company provided him only temporary partial disability benefits because the company alleged that Claimant had the earning capacity to be employed. (JX 1).

Before his injury, the claimant had been seen by Drs. Cambridge, Krompinger, and Warner with a chief complaint of back pain.

Medical Evidence

Dr. William Cambridge issued a series of reports, beginning on May 2, 1997. (CX 4). In his first report, the doctor stated that the claimant had been brought to the hospital by ambulance with acute back pain following a lifting incident. Dr. Cambridge stated that Claimant suffered "ongoing back pain as a result of work related injuries," and his physical examination revealed decreased low back dynamics and lumbar spasm.

On May 30, 1997, Dr. Cambridge opined that the claimant's MRI revealed "diffuse multilevel disc disease with disc profusion at L2-3." The doctor commented that the claimant was miserable and ambulated with a limp. He also stated that the patient's range of motion decreased 80%. He prescribed epidural steroids. (CX 4).

On September 2, 1997, Dr. W. Jay Krompinger, board-certified in orthopedic surgery, examined the claimant and reviewed a May 1997 MRI. (EX 6). The doctor recorded the history of Claimant's back troubles, including the final injury from which the claimant never returned to work. The doctor noted that the claimant's present pain was central back pain with some pain in the right buttock and no major leg pain. After his examination, the doctor opined, "This gentleman has an element of discogenic back pain. He has no radiographical evidence of a significant disc herniation. Patient presently would be capable of doing modified work with lifting restrictions in the range of thirty pounds and a provision against repetitive bending." The doctor concluded that the claimant was at maximum medical improvement.

On November 5, 1997, Dr. Cambridge opined that Dr. Krompinger's IME was unfair to the claimant. Dr. Cambridge asserted that Dr. Krompinger's recommendation of work with restrictions for the claimant was unrealistic. Dr. Cambridge opined that the claimant's multilevel disc disease prevented him for working at Electric Boat at all. He recommended maintaining Claimant on temporary total disability until the claimant could be retrained. (CX 4).

On December 5, 1997, Dr. Cambridge opined, "Clearly Tom is unable to return to his job at General Dynamics and at this point has limited skills such that he is not purposely or gainfully employable at this point." (CX 4).

On January 9, 1998, Dr. Cambridge again examined the claimant. (CX 4). Claimant reported more episodes of back pain and spasms, resulting in one point where he could not walk. The doctor's physical examination revealed low back spasm and a decreased range of motion of the claimant's lumbar spine. The doctor noted that he planned to give the claimant a cane to aid in ambulation.

On January 30, 1998, Dr. Cambridge again examined Claimant, as Mr. Colella complained of more back pain with some pain radiating into his leg. (CX 4). Dr. Cambridge stated
that he would refer Claimant to Dr. Halperin for evaluation and possible discogram.

Dr. Halperin examined the claimant on February 20, 1998. (CX 5). The doctor noted the claimant's work and medical history. The claimant described his pain as "severe to incapacitating," and reported that he felt the pain was getting worse. The doctor's physical examination produced these observations: 1) Claimant ambulates with a slightly antalgic gait favoring the right leg; 2) he can walk on his toes and heels but with pain; 3) he can get in and out of a crouched position; 4) there is a good range of motion of both hips and knees; 5) supine SLR bilaterally causes back pain at about sixty degrees of elevation; and 6) there is tenderness to palpation in the midline at L4-5 and L5-S1, and also over the right PSIS and sciatic notch. Dr. Halperin's diagnostic study of the November 29, 1994 x-rays produced these observations: 1) study demonstrates flattening of the lumbar lordosis; 2) no significant disc abnormalities appreciated; 3) may be slight degenerative changes at L1-2; 4) MRI performed on May 23, 1997, demonstrates disc desiccation at L1-2, perhaps early degenerative changes at L2-3, and normal discs at L3-4, L4-5, and L5-S1; 5) axial cuts reveal a small right extraforaminal disc bulge at L2-3 which does not appear to have any clinical significance; and 6) no other significant abnormalities are appreciated in the lumbar spine. The doctor's impression was "chronic lumbago...no gross neurologic deficit." The doctor recommended physical therapy to the claimant, but Dr. Halperin reported that the claimant was not amenable to that option because he felt that his condition worsened with physical therapy. The doctor stated that the claimant was not a candidate for surgery and maintained that his only recommendation would be that the claimant stay as active as possible.

On February 25, 1998, Dr. Cambridge saw Claimant again. (CX 4). The doctor again noted "intermittent exacerbations of low back pain." Claimant stated that he attempted to lift some firewood but was unable to do so because of increased pain.

Dr. Cambridge issued another examination report on March 25, 1998. (CX 4). He recorded that the claimant suffered from some cognitive problems, in addition to his degenerative arthritis of the spine. The doctor stated, "He is no longer able to do redundant heavy physical labor and every effort should be made to help Tom get his GED and retrain him into another line of work.

On April 14, 1998, Dr. Krompinger again examined the claimant. (EX 12). The doctor noted that the claimant had recently started physical therapy and reported some improvement. The doctor's assessment did not differ from his first conclusions. He stated that the claimant suffered from a chronic lumbar strain and preexisting lumbar degenerative disk disease in the upper lumbar segments. Again, the doctor opined that the claimant retained the capability of performing modified working activity with a thirty pound lifting restriction.

Dr. Krompinger was deposed on April 29, 1998. (EX 13). Substantially, the doctor's testimony reiterated his written conclusions. In addition, the doctor opined that the claimant's lumbar degenerative disk disease preexisted both of his back injuries and caused his disability from April 1997 to be materially and substantially greater. (EX 13, p. 8).

Dr. Cambridge observed that the claimant continued to ambulate with a cane and suffer from lower back stiffness in an April 28, 1998 examination. (CX 4). The doctor noted that the claimant was neurologically intact and that he would prescribe physical therapy.

In a May 27, 1998 report, Dr. Cambridge again recorded that physical examination of the claimant revealed "some decreased low back dynamics." (CX 4).

On July 14, 1998, Dr. Cambridge observed that Claimant has an acute exacerbation of his low back pain. (CX 4). He noted good progress for the claimant during physical therapy and recorded both a "distinct antalgia limp" and "spasm of lumbar paravertebral muscle groups." The doctor opined, "Tom needs to be retrained. Unfortunately, he has a learning disability and will probably have to be tutored to try for his GED."

Two months later, on September 15, 1998, Dr. Cambridge recorded that the claimant was still complaining of chronic low back pain. (CX 4). The claimant was neither working nor taking medication for his pain.. The doctor opined, "Tom needs to pursue some type of education so that he may become gainfully employable."

Dr. Cambridge recorded the claimant's continued complaints of decreased low back dynamics and pain in a November 17, 1998 report. (CX 4). The doctor stated, "Exam today

reveals continued decreased low back dynamics with spasm. Normal neurovascular examination."

On January 19, 1999, Claimant returned to Dr. Cambridge's office, complaining of back pain and pain radiating into his legs with intermittent spasms in his right leg. (CX 4). The doctor noted the claimant's progress and difficulties in his GED program and opined, "He seems to be coming along nicely. He has some spasm of the lumbar spine and decreased [range of motion]. He is neurologically intact."

Claimant visited Dr. Cambridge again on April 27, 1999, complaining of his back giving out when he bent over to pick up his thirty-five pound child. (CX 4). The doctor opined, "Physical examination reveals a slight decrease in low back dynamics with spasm of lumbar paravertebral muscle groups. He is neurologically intact."

Dr. Krompinger examined the claimant for a third time on May 20, 1999. (EX 17). The doctor also reviewed three MRI evaluations of the claimant's lumbar spine. The doctor stated:

> This gentleman has had recurrent lower back strains superimposed upon some upper lumbar disc space degeneration. At present he would be a candidate for sedentary to light duty work. His lifting restrictions given his ongoing symptoms probably should be in the range of twenty-five pounds. He is at maximum medical improvement . . . . This man has had previous lumbar degenerative disc disease which combined with his injury has made [h]is present injury materially and substantially greater than would have been without the pre-existing condition. I would assign a 10% permanency to the lumbar spine, 5% related to the 4/25/97 injury and 5% would be related to his pre-existing conditions including the 1996 injury and his pre-existing lumbar degenerative disc disease.

Id.

On June 1, 1999, Dr. Cambridge reported that the claimant was uncomfortable with his independent medical evaluation. (CX 4). The doctor opined that he has lumbar degenerative disc disease.

Dr. Cambridge documented that Claimant continued to have low back pain and pain radiating into his legs in his August 3, 1999 report. (CX 4). The doctor opined, "Physical examination today reveals low back dynamics are decreased. There is spasm of lumbar paravertebral muscle group. His neurological evaluation remains normal.

Dr. Cambridge reported that Claimant attempted light walking only to have the activity exacerbate his chronic low back pain in his October 26, 1999 report. (CX 4). The

doctor's examination revealed some tightness of the lumbar spine and mild spasm. The doctor also changed the claimant's medication.

Dr. Cambridge again examined the claimant on January 7, 2000. (CX 4). He again noted the claimant's complaints of low back and leg pain. The doctor's examination revealed decreased low back dynamics with spasm.

On August 30, 2000, Claimant was examined by Dr. Myron Shafer. (EX 19). The claimant's chief complaints were low back pain and leg pain, with greater intensity in the right leg. The doctor performed a physical examination and reviewed previous MRIs. Dr. Shafer opined that the claimant should have restrictions of fifteen to twenty pounds lifting, while also avoiding repetitive lifting. He concluded that the claimant had reached maximum medical improvement. The doctor attributed the claimant with 10% permanent disability, 5% resulting from the April 1997 incident at work and 5% resulting from preexisting problems. Dr. Shafer stated, "It is my opinion that the preexisting injury to his back would materially and substantially increase this man's disability." The doctor concluded that the claimant was not totally disabled.

Dr. Cambridge's September 6, 2000 report noted that the claimant continued to ambulate with an "antalgic gait" and recorded that he has decreased low back dynamics and lumbar spasm. (CX 4). The doctor's December 6, 2000 report documented similar conditions.

On March 7, 2001, Dr. Cambridge examined the claimant and diagnosed "lumbar spondylosis, probably progressive."

Christopher Tolsdorf, Ph. D., performed a psychoeducational evaluation on the claimant on November 13, 1998. (CX 7). Mr. Tolsdorf recorded the claimant's employment and familial history and submitted a battery of tests to him, including the Wechsler Adult Intelligence Scale-III, the Wide Range Achievement Test, and the Holland Vocational Interest Inventory. Mr. Tolsdorf concluded that the claimant possesses normal intelligence but also significant learning disabilities in math and spelling. He opined that the claimant's learning disability will be his biggest obstacle in retraining. Mr. Tolsdorf opined that the claimant should seek work in areas which tap his strengths – strong mechanical ability, intact reasoning and problem solving skills, good interpersonal skills, and a willingness to learn. He concluded that the claimant could make a good transition to a new work environment based upon his past employment history.

DISCUSSION

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc*., 390 U.S. 459 (1968); *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Scott v. Tug Mate, Incorporated*, 22 BRBS 164, 165, 167 (1989); *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Anderson v. Todd Shipyard Corp*., 22 BRBS 20, 22 (1989); *Hughes v. Bethlehem Steel Corp*., 17 BRBS 153 (1985); *Seaman v. Jacksonville Shipyard, Inc*., 14 BRBS 148.9 (1981); *Brandt v. Avondale Shipyards, Inc*., 8 BRBS 698 (1978); *Sargent v. Matson Terminal, Inc*., 8 BRBS 564 (1978).

In the instant case, Claimant and Employer stipulate that an injury occurred on April 25, 1997, during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties' stipulation. The extent of that injury, however, is in issue.

Nature and Extent of Disability

Under the Act, "disability" is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss.

Generally, disability is addressed in terms of its extent (total or partial) and its nature (permanent or temporary). A claimant bears the burden of establishing both the nature and extent of his disability. *Eckley v. Fibrex and Shipping Co.*, 21 BRBS 120, 122 (1988); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985). Issues relating to the nature and extent of disability do not benefit from Section 20(a) presumption. The burden is upon the claimant to demonstrate continuing disability, whether temporary or permanent, as a result of his accident.

A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). *Trask*, 17 BRBS at 60. Any disability before reaching MMI would thus be temporary in nature. Neither party disputes the nature of Claimant's disability. The parties stipulate that the sole issue in dispute is the extent of the disability, i.e., whether the claimant is entitled to temporary total or temporary partial benefits. Accordingly, I accept the parties' stipulation that the claimant is temporarily disabled.

The extent of disability is an economic concept. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Thus, in order for a claimant to receive an award of compensation, the evidence must establish that the injury resulted in a loss of wage earning capacity. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225, 1229 (4th Cir. 1985); *Sproull v. Stevedoring Servs. Of America*, 25 BRBS 100, 110 (1991). The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. V. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to any employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

Mr. Colella has the burden of proving the nature and extent of his alleged disability. A claimant establishes a *prima facie* case of total disability by showing that he cannot perform his usual work because of a work-related injury. Once a *prima facie* case is established, the claimant is presumed to be totally disabled, and the burden shifts to the employer to prove the availability of suitable alternate employment. *See Turner*, 661 F.2d at 1038; *Trans-State Dredging v. Benefits Review Bd. [Tarner]*, 731 F.2d 199, 200-02 (4th Cir. 1984); *Eliott v. C & P Telephone Co.*, 16 BRBS 89, 92 (1984). If the employer establishes the existence of such employment, the employee's disability is treated as partial rather than total. However, the claimant may rebut the employer's showing of suitable alternate employment, and thus retain entitlement to total disability benefits, by demonstrating that he diligently sought but was unable to obtain such employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 305, 312 (D.C. Cir. 1991). If, however, the claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

Claimant worked for Electric Boat as a general laborer and, most recently, a painter. The physical requirement of the job are substantial, as illuminated by Claimant's previous testimony before another administrative law judge. (EX 21). Claimant's job required him to, among other tasks: 1) crawl between piping on the submarines; 2) bend and lift in the process of painting, cleaning, and blasting; and 3) carry buckets weighing in excess of fifty pounds over large distances and up flights of stairs.

The medical evidence of record consists of medical opinions of Drs. Cambridge, Krompinger, Halperin, and Shafer. Beginning with his opinion in November 1997, Dr. Cambridge consistently maintained the opinion that Claimant was totally disabled. Drs. Shafer

and Krompinger opined that the claimant was capable of doing modified work with lifting restrictions and no repetitive bending. Dr. Halperin's opinion is silent as to the level of impairment suffered by the claimant. I find that each opinion is well reasoned and probative of the issue of Claimant's impairment level.

The combined weight of the medical and occupational evidence demonstrates that Claimant is totally disabled. The demanding physical requirements of the claimant's job conflict with the impairments caused by Claimant's back injuries. The opinions of Drs. Cambridge, Shafer, and Krompinger all establish that Claimant's current physical condition prevents him from lifting over twenty-five to thirty pounds and, more importantly, engaging in repetitive bending. The opinions demonstrate that the claimant is currently, and has been since 1997, unable to return to his usual employment. No opinion of record maintains that Claimant is able to perform his pre-accident job in an identical manner in his present physical condition.

Accordingly, I find that Claimant has established a prima facie case of total disability.

Suitable Alternative Employment

Once the claimant makes a prima facie showing of total disability, the burden shifts to employer to show suitable alternative employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988). A failure to prove suitable alternative employment results in a finding of total disability. *Manigault v. Stevens Shipping Co.*, 22 BRBS 332 (1989); *MacDonald v. Trailer Marine Transp. Corp*., 18 BRBS 259 (1986).

An employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. The employer is not required to act as an employment agency for the claimant. It must, however, prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community. *Armfield v. Shell Offshore, Inc*., 30 BRBS 122, 123 (1996); *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2nd Cir. 1976); *see also Trans-State Dredging v. Benefits Review Bd. (Tarner)*, 731 F.2d 199, 201 (4th Cir. 1984)(quoting *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43 (5th Cir. 1981)).

The Board has held that a showing by an employer of a single job opening is not sufficient to satisfy the employer's burden of suitable alternate employment. The employer must present evidence that a range of jobs exists which is reasonably available and which the disabled claimant is realistically able to secure and perform. *Vonthronsohnhaus v. Ingalls Shipbuilding, Inc.*, 24 BRBS 154 (1990).

I must determine the claimant's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. *Villasenor v. Marine Maintenance Indus., Inc.*, 17 BRBS 99 (1985). Hence, if the vocational expert is uncertain whether the positions which he identified are compatible with the claimant's physical and mental capabilities, the expert's opinion cannot meet the employer's burden. *Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991); *Davenport v. Daytona Marina & Boat Works*, 16 BRBS 196, 199-200 (1984).

To demonstrate the availability of alternate suitable employment, the employer presents the testimony of Ms. Kathleen Dolan and a labor market survey authored by her. (Tr. 72; EX 1). Ms. Dolan is a medical and vocational case manager with a Master's degree in rehabilitative services. To produce her Labor Market Survey – a list of suitable employment available to the claimant – Ms. Dolan reviewed the medical opinions and depositions of Drs. Cambridge, Shafer, Warner, and Krompinger, the deposition of the claimant, a previous labor market survey, and an assessment interview worksheet. (EX 1, p. 2). She also compiled and reviewed the claimant's academic and employment histories. Using these histories, Ms. Dolan developed a list of possible jobs matching the claimant's skills and academic level through the voir dire process. (Tr. 75). After the list was compiled, she produced an "Adjusted Profile" that took into consideration the claimant's physical limitations. Ms. Dolan then utilized local newspapers, employment resources, and internet resources to identify available jobs in the surrounding area that correlated to jobs outlined in the claimant's profile. The final product was a list of jobs in the surrounding geographical area that were open and available to the claimant considering his physical impairments, academic level, and employment history.

Ms. Dolan testified that she interpreted the claimant's medical restrictions to be lifting no more than twenty pounds and no repetitive lifting. (Tr. 77). At the time she developed the Labor Market Survey, Ms. Dolan, through conversations with each of the employers, believed that each of the jobs fell within the claimant's physical restrictions. (Id.). Furthermore, Ms. Dolan identified that Claimant was in the process of obtaining his GED, and she subsequently eliminated any job on the list that required a GED. (Id.).

After attending the claimant's deposition and observing his testimony at the formal hearing, Ms. Dolan testified that some of the jobs she provided on the Labor Market Survey would be inappropriate for the claimant. (Tr. 78). Specifically, the truck puller position and the front desk positions appeared to be beyond the claimant's physical abilities and cognitive abilities, respectively. (Tr. 78-79). Despite acknowledging the obstacles, Ms. Dolan testified that she believes the

claimant has an current earning capacity. (Tr. 79). She based her conclusions on Claimant's physical capabilities considering his impairment, educational level considering his learning disability, and work history. (Tr. 79-80). With those factors, Ms. Dolan testified that the claimant's working capacity would be between $6.75 and $9.00 per hour.

Ms. Dolan testified that the positions in her Labor Market Survey, with the exception of the truck puller, were open and available to the claimant and were realistic for him to secure and keep as gainful employment. (Tr. 81). Disregarding the truck puller position, the survey listed seven possible jobs for the claimant.

I find that the employer has carried its burden and demonstrated the availability of suitable alternative employment. Of the eight employment possibilities on the labor market survey, the employer has demonstrated the existence of four of them. I do not accept the availability of the truck puller position, which Ms. Dolan testified would be inappropriate for the claimant. (Tr. 78-79). Furthermore, I decline to accept the availability of the front desk clerk at the Residence Inn
or the plastic hospital products assembler. Ms. Dolan's report, in regards to those positions, was assembled with only anecdotal data on the functions of those positions. Specifically, Ms. Dolan's information on the plastic hospital products assembler was gleaned from a receptionist who Ms. Dolan estimated had not formerly held the position. (Tr. 104). It is unclear to whom Ms. Dolan spoke to garner information on the exertional requirements of the front desk job at the Residence Inn. (Tr. 98-99). These are unacceptable sources of information regarding the physical requirements of the respective jobs and do not carry employer's burden in demonstrating alternative, suitable employment. Accordingly, I discard those options as available to the claimant. I do not accept the availability of the remaining front desk position as Ms. Dolan expressed reservation at the ability of the claimant to perform the cognitive requirements of the job satisfactorily. (Tr. 79). As Ms. Dolan's concerns are adequately documented and supported by the remainder of the record, I find that the employer has failed to adequately demonstrate the availability and suitability of the remaining front desk position. *See Uglesich v. Stevedoring Servs. of America*, 24 BRBS 180 (1991)(holding if the vocational expert is uncertain whether the positions which he identified are compatible with the claimant's physical and mental capabilities, the expert's opinion cannot meet the employer's burden).

Four jobs remain on the employer's labor market survey. The first is a PBX operator in Mystic, Connecticut, at the Mystic Hilton Hotel. The job entails receiving and routing telephone calls. Ms. Dolan rated the job as "entry-level" and concluded that the claimant was capable of performing the job with his physical restrictions. The second job is a rubber goods inspector in Bozrah, Connecticut. The job entails the visual inspection of rubber automobile parts. Ms. Dolan again rated the job as "entry-level" and concluded that the claimant was capable of performing the job with his physical restrictions. The third job on the survey was a small products assembler. The

job entails packing and assembling products. The job allows employees the flexibility of sitting or standing, and the employer provides on the job training. Again, Ms. Dolan concluded that the claimant was capable of performing the job with his physical restrictions. The final job on the labor market survey is the dispatcher position in Pawcatuck, Connecticut. The job entails obtaining dispatch information from a facsimile machine, entering schedules,

and dispatching as needed. Ms. Dolan concluded that no skills were needed, on-the-job training was provided, and that the claimant was capable of performing the job with his physical restrictions.

When I consider the physical and psychological impairments of the claimant and compare them to the available jobs provided by the employer, I find that the employer has carried its burden of demonstrating suitable, alternative employment. The employer has provided a range of jobs, all of which I find fall within the claimant's employment factors, including age, education, work experience, and physical restrictions. Accordingly, the employer has carried its burden. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933, 935-36 (2nd Cir. 1976); *Trans-State Dredging v. Benefits Review Bd. (Tarner)*, 731 F.2d 199, 201 (4th Cir. 1984).

"Diligent" Attempt to Secure Employment

If the employer has established suitable alternate employment, the claimant may rebut his employer's showing of suitable alternative employment by demonstrating that he diligently tried but was unable to secure such employment. *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2nd Cir. 1991); *Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139, 141 (1986); *Royce v. Elrich Constr. Co.*, 17 BRBS 157, 159 n.2 (1985).

I find that the claimant has failed to demonstrate the requisite diligence in his search for employment. *Turney v. Bethlehem Steel Corp*., 17 BRBS 232, 236-37 n.7 (1985). The claimant neither followed-up on any of his employment applications, (Tr. 28, 33, 59-60) nor applied for
any jobs outside of the labor market survey. (Tr. 39). Claimant never applied for the rubber goods inspector job because he claimed he could not find the place to apply; (Tr. 33-34), however, simple consultation of a phone book or a telephone call would have yielded the location of
Staffing Consultants. The phone number of the survey preparer - Ms. Dolan - is clearly listed on the report, and she could have provided the address if Claimant had been serious about locating employment. Next, Claimant offers contradictory reasons for his failure to apply for the dispatcher job in Pawcatuck, Connecticut. (Tr. 36). First, Claimant asserted that he did not apply for the job because he did not know where the position was located. Claimant alleges that he did not have a map available to him to ascertain the location of Bozrah, Connecticut. Then, Claimant alleged that the distance was too far to travel for his back. (Tr. 36-37). Claimant cannot have it both ways, and his attempt to do so demonstrates a lack of diligence in locating employment. I find the claimant's testimony indicative of a complete lack of effort, as even the most minimal attempt to have located both the rubber goods inspector job and the dispatcher job would have been successful.

Claimant's testimony also demonstrates an unwillingness to work. Claimant readily testifies that he is not qualified for any of the work listed on the labor market surveys, (Tr. 30, 33, 35, 39,
48, 65), yet the claimant, in turn, also admits that he has never attempted any of the work. (Tr. 30). Claimant testifies that the computer work involved in office work, such as the clerking positions or dispatcher position, would be too complicated for him, (Tr. 65), yet he also testifies that he has surfed the internet on Yahoo.com for information on the value of his beer stein collection. (Tr. 66). I find such contradictions also indicative of an unwillingness to work.

When asked why he had not applied for any jobs outside of those presented to him on a labor market survey, the claimant responded that he "[doesn't] try to do anything strenuous." (Tr. 39). By "strenuous," the claimant referred to constant movement, walking, bending, and lifting. (Id.). However, Claimant's testimony also contradicts this. Claimant testified to occasionally mowing his lawn, (Tr. 40), and playing video games with his son. (Tr. 49). Claimant also expressed an interest in being an armed security guard at a casino, a job with the potential for very strenuous work, making his claim of avoiding strenuous activity appear to be one of convenience. (Tr. 52-53).

Claimant's "application" at six of the eight places of employment found in employer's labor market survey alone does not demonstrate diligence. Indeed, a claimant can demonstrate diligence without applying to a single employment opportunity relied upon by the employer to demonstrate suitable alternative employment. *Palombo*, 937 F.2d at 74. The employer's labor market survey
is not a check-list challenge for the claimant to navigate in his pursuit to demonstrate his unemployability. *Id.* (The employer is not required to become...an employment agency for the claimant, or to convey to claimant information about currently available jobs). The claimant cannot satisfy his burden solely by applying to the specific jobs pointed to by the employer. To allow such limited activity to satisfy Claimant's burden is to misapply the standard set forth in *Palombo*. Once the employer has demonstrated the presence of suitable, alternate employment, the burden shifts to Claimant to demonstrate a diligent effort to obtain employment *like* that demonstrated by the employer. *Id.* In the instant case, the claimant has demonstrated no attempt outside of the labor market survey to secure employment. (Tr. 39). Furthermore, the claimant's effort to obtain employment at the workplaces included in the employer's labor market survey has been less than diligent and less than willing.

I find that the weight of the evidence demonstrates that the claimant has not been diligent in his search for employment. Accordingly, the employer has established suitable alternate employment. The Board and those circuits which have spoken on this issue are now in agreement that total disability becomes partial on the earliest date that the employer establishes suitable alternate employment. *Palombo v. Director, OWCP*, 937 F.2d 70 (2nd Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990); *Stevens v. Director, OWCP*, 909 F.2d 1256 (9th

Cir. 1990); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128 (1991); *Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339 (1988); *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986).

As the employer has established suitable alternative employment, the claimant is not entitled to temporary total disability benefits, but, rather, only temporary partial disability benefits.

Conclusion

For the period from November 4, 2000, through the present and continuing, Claimant, Thomas Colella, is entitled to temporary partial disability benefits only; Claimant is NOT entitled to temporary total disability benefits.

Attorney's Fee

Claimant's counsel is allowed thirty days from the service date of this decision to file his attorney fee application, if appropriate. The application shall be prepared in strict accordance with 20 C.F.R. § 725.365 and 725.366. The application must be served on all parties, including the Claimant, and proof of service must be filed with the application. The parties are allowed thirty days following service of the application to file objections to the application for an attorney's fee.

ORDER

Based on the above findings of fact and conclusions of law, it is hereby ORDERED that Thomas Colella is entitled to the compensation listed below as a result of the claim involved in this proceeding. The specific computations of the award and interest shall be administratively performed by the district director.

1. Employer/Administrator shall pay to Thomas Colella temporary partial disability benefits at the rate of $303.55 per week beginning November 4, 2000, through the present and continuing subject to the provisions of the Act..

2. Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

3. Employer shall receive credit for all amounts previously paid to the Claimant as a result of his April 25, 1997, injury.

A
JOSEPH E. KANE
Administrative Law Judge